IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON	)	
	)	
-VS	)	**45165-4**
	)	
RAYMOND W. GARLAND	)	**PERSONAL RESTRAINT PETITION**
	)	

If there is not enough room on this form, use the back of these pages or use other paper. Fill out all of the form and other papers you are attaching before you sign this form in front of a notary.

A. STATUS OF PETITIONER

I, RAYMOND W. GARLAND,

Apply for relief from confinement. I am now in custody serving a sentence upon conviction of a crime.

1. The court in which I was sentenced is the Pierce County Superior Court, Tacoma, Wa. .

2. I was convicted of the crime of: MANSLAUGHTER 2, MURDER 2, ASSAULT 2, UPOF 1.

3. I was sentenced after Trial on July 9, 2010.

4. The Judge who imposed sentence was Thomas Felnagle.

5. My lawyer at trial court was Barbara Corey .

6. I did appeal from the decision of the trial court. I appealed to the Court of Appeals , Division Two, State of Washington at Tacoma, Washington.

7. My lawyer for my appeal was Shari Arnold.

The decision of the appellate court was published in part.

_____.

8. Since my conviction I have not asked a court for some relief from my sentence other than I have already written above.

9. If the answers to the above questions do not really tell about the proceedings and the courts, judges and attorneys involved in your case, tell about it here: Please see the attached memorandum.

B. GROUNDS FOR RELIEF:

I claim that I have 6 reasons for this court to grant me relief from the conviction and sentence described in Part A.

A personal restraint petition is granted is the petitioner establishes actual and substantial prejudice resulting from a violation of his constitutional rights or a fundamental error of law. In re Personal restraint of Benn, 134 Wn. 2d 868, 952 P. 2d 116 (1998) . The burden of proof is by a preponderance of evidence. In re Personal Restraint of Cook, 114 Wn. 2d 802 , 792 P. 2d 506 (1990).

First Ground

A. I should be given a new trial or released from confinement because of **INEFFECTIVE ASSISTANCE OF MY COUNSEL BARBARA COREY.**

1. The following facts are important when considering my case. (See Verbatim Report, Pages and Clerks Papers cited in the body of the PRP).

2. **DEFENSE COUNSEL BARBARA COREY** was ineffective for :

(a) A flawed trial strategy which resulted in impeachment regarding statements made by my counsel Barbara Corey in prior trials.

The United States and Washington Constitutions guarantee a defendant the effective assistance of counsel in criminal trials. Strickland v. Washington 466 U.S. 668, 684-86, 104 S. Ct. 2052 , 80 L. Ed 2d 674 1984). On review an appellant must show that "(1) defense counsel's representation was deficient *ie.* it fell below an objective standard or

reasonableness based upon consideration of all of the circumstances and (2) that the defense counsel's deficient representation prejudices the defendant, and that there is a reasonable probability that, except for the unprofessional errors, the result of the proceeding would have been different. State v. McFarland 127 Wn. 2d 322, 334-35, 899 P. 2d 251 (1995).

The omnibus hearing in my case was held on July 1 2006, this was before my first trial, and the omnibus order stated the defenses as general denial and self- defense. CP 1447-1448.

In my first trial in January , 2007, Ms. Corey began her opening statement by stating that I had a gun. 6CP 1090. Thereafter , in my second trial, Ms. Corey told the jury that I had a gun and the victim Brock had a gun. 6 CP 1117, and claimed that I had acted in self-defense. Finally, in the third trial, Ms. Corey argued in opening statements that Marcy gave Brock a gun and I heard a shot go off. 6 CP 1172.

At the commencement of the third trial, the court and Ms. Corey had a discussion regarding the defense theory of the case.

The Court :

"are there going to be any theories that had not been advanced such that the State has to be considering them? 2 RP 133 .

Ms. Corey replied :
" I honestly don't know of anything." 2 RP 134.

The Court :
" but is doesn't necessarily answer the question the State raised, which is are there any other theories that are being advanced? "

Ms. Corey
"No." RP 134.

Ms. Corey then reserved an opening statement .

This change of strategy by Ms. Corey was a surprise to the court, the prosecution , and to myself. The court admonished Ms. Corey for not being up front about the nature of the defense theory. 24 RP 3123. Ms. Corey stated that the theory of the case came directly from her and not from any communications with me. 27 RP 3746.

As a result of this I believe that by any objective standard my defense was prejudiced by the actions Ms. Corey. When the court allowed the State to use the opening statemetns from the prior trials which had advanced material facts which were contrary to the new opening statement, it adversely affected my credibility , and cast a pall over the entire trial which substantially contributed to the jury finding me guilty .

Ineffective assistance of counsel is a mixed question of law and fact. Personal Restraint of Brett 142 Wn. 2d 868 (2001). The facts in this case clearly indicate a legal basis for ineffective assistance of counsel as this type of trial strategy is unprecedented , ill-conceived and flawed from both a factual and legal perspective. It undermined any legitimate self defense presentation, and allowed the State to argue contradicting defense positions which created an air of prejudice that permeated my entire trial. The prejudice which resulted extinguished any hope of a fair trial. Considering all of the circumstances, the presentation by Ms. Corey was not reasonable, adequate, or effective. I believe that I have demonstrated both that the performance of Ms. Corey was deficient, deceptive, and unprofessional, and that there is a reasonable probability that the result of the trial would have been different. In re Personal Restraint of Grace, 174 Wn. 2d 835 (2012).

When Ms. Corey renewed the motion to exclude the evidence on a motion for reconsideration, the following statements were made :

The Court: "And set the record straight, if necessary, You can't mislead the State can you? You can't lead them down one path and say "Oh aha, now its really different that what I said." Maybe you don't have an obligation to come forward initially—and I don't even agree with that proposition—but you certainly must have an obligation not to speak one thing in an open courtroom setting and then turn around and proffer something completely different the next time you have an opportunity. "

Ms. Corey: What?

The Court: That's not fair , is it?

Ms. Corey: I think it is

The Court : Wow

Based upon my attorney misleading the court, prosecuting attorney, and myself, I am asking that this court find the conduct of Ms. Corey constituted ineffective assistance of counsel and grant me a new trial. The tactics employed by her in this case changed the outcome of the trial, as the impeachment issues that followed damages the credibility of my defense. State v. Frederick, 95 Wn. App. 916 (1986). Under any objective standard of reasonableness, this conduct is ineffective assistance of counsel. State v. Risenbach, 153 Wn. 2d 126 (2004). They were not legitimate trial tactics. State v. Grier, 171 Wn. 2d 17 (2011).

2. Second Ground

I believe that my appellate counsel was deficient for failing to raise constitutional errors and I believe that I was actually and substantially prejudiced . In re Personal Restraint of Dalluge 152 Wn. 2d 772, 777, 100 P. 3d 279 (2004).

The following issues were **not** raised by my appellate counsel Sheri Arnold:

(1) A January 17 and January 18, 2007 denial of my motion to suppress evidence obtained pursuant to a search warrant. RP 270 1-18-2007. This motion was raised again on August 31, 2009. CP 1004-1020. The original motion was in the form of a *Franks*

hearing on the theory that the Order of Trespass obtained by Detective Heishman was illegal and that the subsequent search warrant of November 17, 2004 was thereby tainted, and that all evidence found was fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). At issue was Exhibit 155, which showed the defendant with what appeared to be a firearm. RP 15-2084

The motion was revisited on September 9, 2009 during the third trial.

The court stated:

> " I don't see anything that suggests that the issues before us now weren't already addressed then...(RP 15-2109.
>
> " The totality of this , in my opinion , if we are going to have an honest trial , if we are going to have a fair resolution of this, the State is now entitled to bring in the evidence as impeachment. "

The evidence was allowed subject to a limiting instruction. RP 2120. There was an objection to the language of the limiting instruction. RP 3789.

There were no findings of fact or conclusions of law entered by the court in regard to the earlier ruling upheld by the court . RP15-2080 9-9-2009.

Both Judge Buckner, Judge Felnagle, and Prosecuting Attorney Steven Penner erred when written findings of fact and conclusions of law were not entered after the January 17-18 , 2007 hearing and the reconsideration on September 9, 2009. Cr 3.6 should be complied with. The remedy is dismissal. State v. Cruz, 88 Wn. App. 905, (1997).

From a purely 4th Amendment perspective, the evidence should not have been allowed, as the initial "search" by Heishman invalidated the subsequent warrant.

Illegally obtained evidence is not admissible in court. Mapp v. Ohio 367 U.S. 643 (1961) is the landmark 4th amendment case in which the United States Supreme Court decided that evidence obtained in violation of the Fourth Amendment , which protects against "unreasonable searches and seizures" may not be used in state law criminal prosecutions. A search warrant may issue only upon a determination of probable cause. State v. Cole, 128 Wn. 2d 262 , 906 P. 2d 925 (1995). An application for the warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. State v. Smith 93 Wn. 2d 329, 610 P. 2d 869 (1980) ; State v. Helmka, 86 Wn. 2d 91, 542 P. 2d 115 (1975).

Probable cause exists if the affidavit in support of the search warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probable involved in criminal activity and that evidence of the crime can be found at the place to be searched. State v. Dalton, 73 Wn. App. 132, 136, 868 P. 2d 873 (1994).

Accordingly , "probable cause requires a nexus between the item to be seized and the place to be searched. " State v. Thein, 138 Wn. 2d 133 (1999). In this proceeding the search was not supported by probable cause, and it was error for Judge's Buckner and Felnagle to deny my motion to suppress the evidence. RP 270 1-18-2007. RP 2076-2116.

The evidence obtained was prejudicial in that is resulted in the jury viewing photographs of me with an air rifle and resulted in cross examination (RP 3806-7)

wherein I had to respond to questions from Prosecutor Penner regarding those photographs which were illegally seized by the police .
This is a meritorious issue which was not raised by my appellate counsel Sheri Arnold, and it is of constitutional magnitude.

Third Ground

It was error for the court to allow any gang evidence. Judge Felnagle ruled that gang evidence was inadmissible under ER 403 and reaffirmed this ruling during trial. CP 3766. Gang evidence was then allowed subject to a limiting instruction. CP3809.

Penner: "That night when you were arguing with Mr. Brock, you did say that you were a 26 Block Crip, right?

Garland: "Yes"

Affiliation with a gang is protected by our First Amendment. Dawson v. Deleware, 503 U.S. 159, 117 L. Ed. 2d 309 , 111 S. Ct. 1093 (1992). Therefore, evidence of gang affiliation is not admissible in a criminal trial if it merely reflects a persons beliefs or associations. Evidence of street gang affiliation is admissible in a criminal trial if there is a nexus between the crime and gang membership. *Id.at 166-8.* Washington courts have likewise recognized the need for this connection before admitting evidence of gang membership. State v. Johnson, 124 Wn. 2d 57, 67, 873 P. 2d 514 (1994). Accordingly , to admit gang membership, there must a nexus between the crime and gang membership. State v Campbell, 78 Wn. App. 813, 822, 901 P. 2d 1050, *review denied* 128 Wn. 2d 1004 (1995). Evidence of gang affiliation is considered prejudicial. State v. Asaeli, 150 Wn. App. 543-544 , 208 P. 3d 1136 (2009).

In this case, the court rationalized that this was an admission. This was error. This evidence was not offered to establish a motive for a crime or to show that there was a conspiracy. The courts failure to connect the evidence to the crime was error. The question remaining whether the error was harmless. Evidentiary error can be harmless if, within reasonable probability , it did not materially affect the verdict. State v. Zwicker, 105 Wn. 2d 228, 243, 713 P. 2d 1101 (1986). That standard is not met in this case. The evidence at trial only showed that the defendant was a gang member. The only reasonable inference for the jury to draw from this evidence was that the defendant was a bad person, and was therefore prejudicial .

When constitutional errors or fundamental defects not raised by appellate counsel are alleged, it must first be shown that the legal issue that appellate counsel failed to raise had merit. In re Personal Restraint of Maxfield, 133 Wn. 2d 332, 945 P. 2d 196 (1997). Second , it must be shown that there was actual prejudice by appellate counsel's failure to raise the issue. In re Personal Restraint of Dalluge , 152 Wn. 2d 772 (2004).

The issues I have presented above regarding ineffective assistance of trial and appellant counsel, the non-suppression of photographic evidence and gang evidence constitute error.

Under the cumulative error doctrine, a defendant's conviction may be reversed when the combined effect of trial errors effectively deny the defendant's right to a fair trial, even if each error alone would be harmless. State v. Weber, 159 Wn. 2d 252, 279, 149 P. 3d 646 (2006) *cert. denied* 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007).

Fourth Ground

1. I should be given a new trial or released from custody because **VERDICTS** were inconsistent .

2. The Jury returned verdicts of guilty which are contrary to law. I was convicted on October 26, 2009 of the crimes of second degree manslaughter and second degree murder. and second degree assault. CP 1346-7, 1351-3. These verdicts were inconsistent as the state was allowed to argue transferred intent to the jury under the Courts Instruction No. 49. State v. Wilson, 125 Wn.2d 212 (1994). State v. Clinton, 25 Wn. App. 400 (1980).

Fifth Ground

1. I should be given a new tial or released form custody because my attorney was allowed **WITHDRAW** from my case after a closed hearing where she raised an ethical concern.
2. BARBARA COREY was allowed to withdraw after a closed in camera session during which I was not present, a record was not made by the court, and no basis for the withdraw was ever communicated to me. I have attached a memorandum of a journal entry from June 8, 2010 where at 9:43 a.m. Ms. Corey , my defense counsel indicated that she had an ethical concern and requested an "in camera" hearing. The record was sealed by the court. No indication of the ethical concern was placed on the record, and Ms. Corey did not inform me of the ethical concern.

A court has a duty to determine whether an actual conflict exists before it may grant a motion to withdraw and substitute counsel. In re personal restraint of Richardson, 100 Wn. 2d 669 (1983). This is a question of law reviewed de novo. State v. Ramos, 83 Wn. App. 622 (1996). A conflict of interest may amount to ineffective assistance of counsel when it adversely affects a clients interest. State v. Regan, 143 Wn. App. 419 (2008). State v. White 80 Wn. App. 406 (1995). Mickens v. Taylor, 535 u.s. 162 (2002). The court in my case made no inquiry as to the nature of the conflict, when it had arisen, and the grounds for the substitution of counsel. This was error.

Sixth Ground

1. I should be given a new trial or released from custody as my attorney did not Communicate a plea offer and further proceedings led to a less favorable outcome.

The Sixth Amendment of the Constitution requires effective assistance of counsel at every stage of a criminal proceeding. It also extends to the plea bargaining process. Lafler v. Cooper , _____ U.S. _____, 182 L. Ed. 2d 398, 132 S. Ct. 1370 (2012), and Missouri v. Frye, _____U.S. _____, 182 L. Ed 2d 379, 132 S. Ct. 1399 (2012). Effective assistance of counsel includes assisting the defendant in making an informed decision about the consequences of whether to plea guilty of go to trial. State v. ANJ, 168 Wn. 2d 91, 111, 225 P. 2d 956 (2010). Defense counsels duties include communicating actual offers, discussing tentative plea negotiations, and discussing the strengths and weaknesses of the defense so that the defendant knows what to expect and can make an informed decision on whether to plead guilty. State v. James, 48 Wn. App. 353 (1987).

There was no plea offer ever communicated to me by my defense counsel during the entire pendency of the case , from the initial arraignment period , through her withdrawal.

The only mention of a plea agreement was an in camera review. RP 117. I was not present at this in camera review, the subject matter of the closed hearing was not discussed with me, and I was not provided with a copy of the offer sent out in the discovery. I believe the failure of my counsel to inform me of a plea offer was ineffective assistance of counsel which resulted in prejudice, and a longer sentence. I am therefore asking that the court find that this was error .

C. STATEMENT OF FINANCES:

If you cannot afford to pay the $250 filing fee or cannot afford to pay an attorney to help you, fill out this form. If you have enough money for these, do not fill this part of the form. If currently in confinement you will need to attach a copy of your prison finance statement.

1. I do ask the court to file this without making me pay the $250 filing fee because I am so poor and cannot pay the fee.

2. I have $50.00 in my prison or institution account.

3. I do not ask the court to appoint a lawyer for me .

4. I am not employed.

5. During the past 12 months I did not get any money from a business, profession or other form of self-employment.

6. During the past 12 months I:

Did Not Receive any rent payments. If so, the total I received was $_____

Did Not Receive any interest. If so, the total I received was $_____

Did Not Receive any dividends. If so, the total I received was $_____

Did Not Receive any other money. If so the total I received was $_____

Do Not Have any cash except as said in question 2 of Statement of Finances.

Do Not Have any savings or checking accounts.

Do Not Own stocks, bonds or notes

7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what eat item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value
NONE	

8. I am married. If I am married, my wife name and address is:

YASMIN HUSSEIN 173 LING ROAD , LONDON ENGLAND

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9. All of the persons who need me to support them are listed below:

Name & Address	Relationship	Age
NONE		

10. All the bills I owe are listed here:

Name & Address of Creditor	Amount
Pierce County Superior Court 910 Tacoma Avenue Tacoma, Wa	$6,000.00

D. REQUEST FOR RELIEF:

I want this court to:

Vacate my conviction and give me a new trial or

Vacate my conviction and dismiss the criminal charges against me without a new trial

E. OATH OF PETITIONER

STATE OF WASHINGTON)
) ss.
COUNTY OF GRAYS HARBOR)

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

RAYMOND GARLAND

SUBSCRIBED AND SWORN to before me this _____day of _____ 2013

Notary Public in and for the State of Washington
Residing at _____

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a Notary: I am incarcerated in Stafford Creek Corrections Center. DOC#834942

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

DATED This 10Th day of JULY , 2013

Ray Garland

RAYMOND GARLAND